

3-1-2001

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Rebecca Brannan

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### Recommended Citation

Rebecca Brannan, *When the Pig is in the Barnyard, Not the Parlor: Should Courts Apply a "Coarseness Factor" in Analyzing Blue-Collar Hostile Work Environment Claims?*, 17 GA. ST. U. L. REV. (2001).

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# WHEN THE PIG IS IN THE BARNYARD, NOT THE PARLOR: SHOULD COURTS APPLY A "COARSENESS FACTOR" IN ANALYZING BLUE-COLLAR HOSTILE WORK ENVIRONMENT CLAIMS?

## INTRODUCTION

In property law, "[a]nything wrongfully done or permitted which injures or annoys another in the enjoyment of his legal rights" is an actionable nuisance.<sup>1</sup> The existence of an actionable nuisance can be situational: "A nuisance may be merely a right thing in the wrong place—like a pig in the parlor instead of the barnyard."<sup>2</sup>

Similarly, some courts view the employment law issue of hostile work environment as situational, with offensive, discriminatory behavior being tolerated as more of a "right thing" (at least in the sense of not being actionable) in blue-collar settings.<sup>3</sup> And as is axiomatic in property law,<sup>4</sup> sometimes relief is barred for a plaintiff who "came to the nuisance."<sup>5</sup>

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1. BLACK'S LAW DICTIONARY 29 (6th ed. 1990).

2. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926).

3. *See, e.g., Filipovic v. K & R Express Sys.*, 176 F.3d 390, 398-99 (7th Cir. 1999) (affirming summary judgment for the employer on a dockworker's national origin hostile work environment claim after reasoning that "ethnic slurs were simply part of the normal dock environment" and concluding that they were "occurrences which this Court hardly deems actionable in this type of employment setting"); *Munday v. Waste Mgmt.*, 858 F. Supp. 1364, 1372 (D. Md. 1994) (finding, in a bench trial, no sexual harassment of a female truck driver and observing that "the record discloses a tough, earthy atmosphere in which there were undoubtedly statements and questions that would have grated upon a reasonable woman"). *But cf. Cummings v. Walsh Constr. Co.*, 561 F. Supp. 872, 878 (S.D. Ga. 1983) (rejecting, without directly addressing, a defense that "off-color remarks and innuendoes are part and parcel of a construction site and are to be expected").

4. *See, e.g., Kanna v. Benton County*, No. 17270-8-III, 1999 Wash. App. LEXIS 059, at \*26 (Wash. Ct. App. Apr. 15, 1999). "Plaintiffs who purchase . . . property after the establishment of a local nuisance activity, have 'come to the nuisance.' While this fact [at common law] did not absolutely bar the plaintiff's nuisance action, it was one factor to be considered in whether to grant the plaintiff relief." *Id.* Analogizing hostile work environment claims, especially sexual ones, to a property law issue may not be as far-fetched as it first seems, as "many male workers may view not only their jobs, but also the male-dominated composition and masculine identification of their work, as forms of property to which they are entitled." Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1755 n.387 (1998).

5. *See, e.g., Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620 (6th Cir. 1986) (asserting

This Note addresses the implications of taking a situational approach in considering the work setting's "coarseness factor"<sup>6</sup> to determine if an employment environment is hostile enough to violate Title VII.<sup>7</sup> Part I provides an overview of the development of "hostile work environment" as a cause of action under the statute. Part II examines how lower courts have used the coarseness factor in deciding hostile work environment cases in blue-collar settings.<sup>8</sup> Part III reviews Supreme Court hostile work environment decisions for guidance on the appropriateness of using the coarseness factor. Part IV analyzes

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that "a proper assessment . . . of an employment environment that gives rise to a sexual harassment claim would invite consideration of such . . . factors as . . . the lexicon of obscenity that pervaded the environment of the workplace both before and after the plaintiff's introduction into its environs, coupled with the reasonable expectation of the plaintiff upon voluntarily entering that environment"), *overruled in part by* Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993) (holding that a Title VII hostile work environment claim does not require concrete psychological injury).

6. The "coarseness factor," as used in this Note, refers to the crassness, boorishness, or vulgarity that courts attribute to blue-collar work settings. *See, e.g.*, Gross v. Burggraf Constr. Co., 53 F.3d 1531, 1538 (10th Cir. 1995) (noting "we must evaluate [a plaintiff's] claim of gender discrimination in the context of a blue collar environment where crude language is commonly used"); Baty v. Willamette Indus., No. 96-2181-JWL, 1997 U.S. Dist. LEXIS 8031, at \*19 (D. Kan. May 1, 1997) (stating that "the court recognizes that the plaintiff worked in a blue collar environment where vulgar language was commonly used"), *aff'd*, 172 F.3d 1232 (10th Cir. 1999). The coarseness factor is sometimes used to downplay the significance of discriminatory behavior experienced by a Title VII hostile work environment plaintiff. *See, e.g.*, Bolden v. PRC, Inc., 43 F.3d 545, 550 (10th Cir. 1994) (finding sporadic racial comments were not actionable, especially when badgering was "commonplace of the blue collar environment of the electronics shop").

7. 42 U.S.C. §§ 2000e to 2000e-17 (1994).

8. The adjective "blue-collar" describes "wage earners whose duties call for the wearing of work clothes or protective clothing." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 162 (1987). While this Note focuses on the blue-collar workplace of shop and factory, courts apply a coarseness factor in a variety of settings. *See, e.g.*, Smith v. Sheahan, No. 95 C 7203, 1997 U.S. Dist. LEXIS 20753, at \*23 (N.D. Ill. Dec. 19, 1997) (stating that "altercations between co-workers . . . are a more frequent occurrence in the aggressive setting of a jail than would be the case in other work places"), *rev'd in part, aff'd in part*, 189 F.3d 529 (7th Cir. 1999); Fortner v. Kansas, 934 F. Supp. 1252, 1260 (D. Kan. 1996) (observing that "[i]t is uncontroverted that profanity and cussing are part of the daily life in the military . . . as judged by a military environment, the plaintiff fails to show she suffered a 'steady barrage of opprobrious sexual comments'"). Courts sometimes apply "blue-collar" to the work environment as a whole, regardless of the plaintiff's occupation. *See, e.g.*, Kelly v. Boeing Petroleum Servs., 61 F.3d 350, 360 (5th Cir. 1995) (affirming trial court's finding of no hostile work environment on a petroleum reserve site supervisor's claim under the Louisiana Civil Rights Act for Handicapped Persons, partly because his superior "engaged in typical, blue-collar (as distinguished from executive suite) workplace kidding, well short of cruel disparagement or mockery").

the implications and advisability of applying the factor. Finally, this Note concludes that if the remedial goals of Title VII are to be achieved in blue-collar workplaces, courts should not apply the coarseness factor to hostile work environment claims.

## I. LEGAL FOUNDATIONS

### A. Title VII

Congress enacted Title VII of the Civil Rights Act of 1964<sup>9</sup> to combat systemic problems of discrimination in employment.<sup>10</sup> The statute applies to all but the smallest employers.<sup>11</sup> Before its enactment, employers operated under the almost unfettered system, established at common law, of employment at will.<sup>12</sup> "Free from legal interference, employers could refuse to hire racial minorities, segregate the work-force, assign unpleasant work to women and racial minorities, and deny to them opportunities for advancement. They could pay discriminatory wage rates for equal work and arbitrarily demand differing levels of job performance."<sup>13</sup>

In contrast, federal law now provides that it is "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to . . . compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."<sup>14</sup> Title VII jurisprudence has evolved to encompass several broad theories of employment discrimination,<sup>15</sup> but it has also been honed within those broad categories to address distinctive problems.<sup>16</sup> The hostile or abusive work environment (operating as racial or sexual harassment, or

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9. 42 U.S.C. §§ 2000e to 2000e-17 (1994).

10. See MICHAEL J. ZIMMER, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 85 (2000).

11. See *id.* at 86. Title VII applies to almost all employers of fifteen or more employees. See *id.*

12. See MACK A. PLAYER, FEDERAL LAW OF EMPLOYMENT DISCRIMINATION IN A NUTSHELL 1 (1992).

13. *Id.*

14. 42 U.S.C. § 2000e-2(a) (1994).

15. See ZIMMER, *supra* note 10, at 85-86. The three broad theories are disparate treatment, systemic disparate treatment, and disparate impact. See *id.*

16. See *id.* at 511-12.

less commonly, as national origin or religious harassment) is a subcategory of discrimination that is actively litigated.<sup>17</sup>

### *B. Role of the EEOC in Statutory Interpretation*

The Executive Branch of the federal government has vested responsibility for the administration and enforcement of Title VII in the Equal Employment Opportunity Commission (EEOC).<sup>18</sup> The EEOC issues formal guidelines and less formal policy statements on Title VII interpretation and enforcement.<sup>19</sup> In 1980, the EEOC first issued guidelines on discrimination created by sexual harassment.<sup>20</sup>

These guidelines stipulate that this discrimination includes conduct that "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."<sup>21</sup> Though the principles appear under the banner of "sexual harassment," a footnote stipulates that they also apply to claims of race, color, religion, or national origin harassment.<sup>22</sup>

The Supreme Court has consistently factored the EEOC's guidelines into its decision-making on hostile work environment claims, and has relied on them as an authoritative source whenever they have been on point with the issue before the Court.<sup>23</sup> Technically, the EEOC is not entitled to the

17. *See id.* at 548-49; *see also* Faragher v. City of Boca Raton, 524 U.S. 775, 798 (1998) ("It is by now well recognized that hostile environment . . . harassment by supervisors (and, for that matter, coemployees) is a persistent problem in the workplace."). Claims of hostile environment harassment based on sex have predominated. *See* ZIMMER, *supra* note 10, at 548. Sexual harassment poses special problems because, much more than any other form of discriminatory behavior, it can resemble conduct that is considered normal social interaction off the job. *See id.* at 549.

18. *See* PLAYER, *supra* note 12, at 40.

19. *See id.* at 41.

20. *See* Robert J. Gregory, *You Can Call Me a "Bitch" Just Don't Use the "N-Word": Some Thoughts on* Galloway v. General Motors Service Parts Operations and Rodgers v. Western-Southern Life Insurance Co., 46 DEPAUL L. REV. 741, 743 (1997).

21. 29 C.F.R. § 1604.11(a)(3) (1998).

22. *See id.* at n.1.

23. *See, e.g.,* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986) ("The EEOC Guidelines fully support the view that harassment leading to noneconomic injury can violate Title VII."); Faragher v. City of Boca Raton, 524 U.S. 775, 806 (1998) ("As long ago as 1980, the EEOC . . . adopted regulations advising employers to 'take all steps necessary to prevent sexual harassment from occurring, such as . . . informing employees of their right to raise and how to raise the issue of harassment.'"); Burlington

deference from courts that is outlined in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>24</sup> Nonetheless, the Supreme Court shows great respect for the EEOC's guidance on harassment principles.<sup>25</sup>

### *C. Development of Case Law*

The first published judicial opinion to address the hostile work environment theory was *Rogers v. EEOC*,<sup>26</sup> a race and national origin case in the Fifth Circuit that predated the EEOC guidelines.<sup>27</sup> The Supreme Court first recognized the hostile work environment as a form of employment discrimination in a 1986 sexual harassment case,<sup>28</sup> *Meritor Savings Bank v.*

*Indus. v. Ellerth*, 524 U.S. 742, 755 (1998) ("The EEOC has issued Guidelines governing sexual harassment claims under Title VII, but they provide little guidance on [this] issue . . ."). *But see Faragher*, 524 U.S. at 811 n.1 (Thomas, J., dissenting) ("[B]ecause the EEOC has no substantive rulemaking authority under Title VII, the Court is inaccurate to refer to [its 1980 guidance] as a 'regulation[n]'."); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22-23 (1993) ("We need not . . . specifically address the Equal Employment Opportunity Commission's new regulations of this subject . . .").

24. 467 U.S. 837, 843-44 (1984) (stating that if a court determines that an agency's interpretation of an issue related to the statute the agency administers is based on a reasonable construction of the statute, the court should not impose its own construction). *But see Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1976) (noting that "Congress . . . did not confer upon the EEOC authority to promulgate rules or regulations pursuant to [Title VII]"), *main holding superceded by statute*, 42 U.S.C. § 2000e(k) (2000) (The Pregnancy Disability Act).

25. *See supra* note 23 and accompanying text. A Supreme Court Justice has forgotten that the EEOC is not due *Chevron* deference on at least one occasion. *See* U.S. Supreme Court Official Transcript at 36, *Oncale v. Sundowner Servs., Inc.*, 523 U.S. 75 (1998) (No. 96-5568) [hereinafter *Oncale* Transcript] (recording a Justice's questioning of Sundowner's counsel about the EEOC during oral arguments, "They get no *Chevron* deference, you say? . . . Well, what's the basis for that understanding?", followed by Justice Stevens' supplying the answer).

26. 454 F.2d 234 (5th Cir. 1971).

27. *See id.* at 239.

28. Although the Supreme Court has dealt directly only with sexually hostile work environments to date, in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), the Court observed that racial harassment in the workplace is actionable and that in *Meritor*, it had approved claims against racially hostile work environments by implication when it affirmed the regulatory guidance of the EEOC, which "has long recognized that harassment on the basis of race . . . is an unlawful employment practice." *Id.* at 180. More recently, the Court noted that although "racial and sexual harassment will often take different forms . . . we think there is good sense in seeking generally to harmonize the standards of what amounts to actionable harassment." *Faragher*, 524 U.S. at 787 n.1. The majority of harassment charges brought before the EEOC are filed on the basis of sex, and the commission's data suggest that the ratio of sexual harassment charge filings to harassment charge filings based on other statutory grounds is growing. *See*

*Vinson*.<sup>29</sup> Noting that lower courts had applied the hostile environment theory to racial harassment cases, the Court formally extended the theory to sexual harassment and asserted that "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult."<sup>30</sup> Unlawful behavior is not limited to acts of economic harm or tangible discrimination, the Court stated, because the statute is designed to "strike at the entire spectrum of disparate treatment' . . . in employment."<sup>31</sup>

In 1993, the Court issued its opinion on *Harris v. Forklift Systems, Inc.*,<sup>32</sup> and further clarified the requirements and scope of a cause of action for hostile work environment.<sup>33</sup> The Court instructed lower courts to look at "all the circumstances" in these cases.<sup>34</sup> For example, while psychological harm to the employee is pertinent, it is not a requirement.<sup>35</sup> It is but one factor to consider, along with the following other factors: the frequency of the objectionable conduct; the severity of the conduct; whether the conduct involved physical threats or humiliation instead of milder speech; and whether the employee's work performance was affected by the objectionable conduct.<sup>36</sup>

Of the trilogy of hostile work environment employment cases that were heard by the Court in 1998,<sup>37</sup> *Oncale v. Sundowner Offshore Services, Inc.*<sup>38</sup> provided the most extensive new guidance on the actionability of hostile work environment claims.<sup>39</sup> Holding that same-sex harassment is actionable, the Supreme Court cautioned that Title VII is not to be turned into

Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71, 122 n.342 (1999).

29. 477 U.S. 57 (1986).

30. *Meritor*, 477 U.S. at 65.

31. *Id.* at 64 (quoting *Los Angeles Dep't of Water & Power v. Manhart*, 432 U.S. 702, 707 (1970) (quoting *Sprogis v. United Airlines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971))).

32. 510 U.S. 17 (1993).

33. *See Harris*, 510 U.S. at 21-23.

34. *Id.* at 23.

35. *Id.*

36. *Id.*

37. The other two cases are *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

38. 523 U.S. 75 (1998).

39. *See Oncale*, 523 U.S. at 79-82.

a "general civility code."<sup>40</sup> The Court called for "common sense" to be applied to hostile work environment claims, noting that "a constellation of surrounding circumstances, expectations, and relationships" come into play in these cases.<sup>41</sup>

## II. LOWER COURTS' USE OF THE COARSENESS FACTOR

### A. Sixth Circuit: *Rabidue*; *Recent Views*

Under the doctrine of assumption of risk, a plaintiff may not recover for an injury received when the individual voluntarily exposed herself to a known and appreciated danger.<sup>42</sup> Use of assumption of risk as a defense in employment settings peaked during the Industrial Revolution.<sup>43</sup> Ignoring the unequal bargaining power between employers and employees, courts reasoned that because workers were not "forced" to take or to remain in any given job, those who accepted dangerous jobs and continued to work under dangerous conditions had assumed the risk of injury.<sup>44</sup>

One of the theories underlying Title VII is that the tolerance that powerless individuals develop to offensive working conditions should not be used to define acceptable workplace conduct toward them.<sup>45</sup> That someone might be "willing" to work with treacherous chemicals without protection, or for less than minimum wage, or for fifty hours a week with no overtime pay, does not justify those working conditions.<sup>46</sup> Safety and wage laws protect against those working conditions because the

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40. *Id.* at 79-80. The press published concerns before *Oncale* was decided that the Court could turn Title VII into a "good manners in the workplace" rule. *See, e.g.,* David G. Savage, *Supreme Court Will Rule on "Same Sex Harassment,"* L.A. TIMES, June 10, 1997, at A1; *The Perils of Flirtation*, ECONOMIST, Feb. 14, 1998, at 25. When *Oncale* was argued before the Court, one of the Justices quizzed the plaintiff's lawyer about Title VII, saying, "[I]s this a dirty-word law, or something? It wasn't meant to produce politeness . . ." *Oncale* Transcript, *supra* note 25, at 14.

41. *Oncale*, 523 U.S. at 82.

42. BLACK'S LAW DICTIONARY 123 (6th ed. 1990).

43. *See* Kelly Ann Cahill, Note, *Hooters: Should There Be an Assumption of Risk Defense to Some Hostile Work Environment Sexual Harassment Claims?*, 48 VAND. L. REV. 1107, 1120 (1995). For a closer examination of the assumption of risk defense implicit in the holding of *Rabidue v. Osceola Ref. Co.*, *see id.* at 1134-36.

44. *See id.* at 1120.

45. *See* Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 847 (1991).

46. *See id.*



market, operating alone, does not.<sup>47</sup> Title VII protects employees in a similar manner.<sup>48</sup>

In a holding that tacitly approved an assumption of risk defense, the Sixth Circuit, in *Rabidue v. Osceola Refining Co.*,<sup>49</sup> affirmed the lower court's judgment for the employer on a sexually hostile work environment claim.<sup>50</sup> In this early, influential case, a supervisor at a petrochemical refinery in Michigan persistently referred to women as "whores," "cunt," "pussy," and "tits" in the workplace.<sup>51</sup> The posters and other images of nude and partially nude women that were on display embarrassed the plaintiff and the other women who worked at the refinery.<sup>52</sup> Management allowed the offensive language and displays in the workplace to the point that they became "a 'fairly significant' part of the job environment."<sup>53</sup>

Of the plaintiff, the supervisor remarked, "All that bitch needs is a good lay."<sup>54</sup> Though this supervisor's superior gave him "a little fatherly advice" that being more of "an executive type person" would improve his career prospects, the company viewed his computer expertise as indispensable and did not dismiss or formally reprimand him.<sup>55</sup> Osceola's vice president acknowledged that he knew the women were "greatly disturbed" by this individual's language.<sup>56</sup> After a five-day bench trial, the district court concluded that the plaintiff's work difficulties were due to her own "temper and stubbornness," not the vulgar language and sex-oriented posters in the office.<sup>57</sup>

47. *See id.*

48. *See id.*

49. 805 F.2d 611 (6th Cir. 1986), *overruled in part by* Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993) (holding that a Title VII hostile work environment claim does not require concrete psychological injury).

50. *Rabidue*, 805 F.2d at 623.

51. *Rabidue v. Osceola Ref. Co.*, 584 F. Supp. 419, 423 (E.D. Mich. 1984); *see also Rabidue*, 805 F.2d at 624 (Keith, J., concurring in part, dissenting in part).

52. *Rabidue*, 805 F.2d at 623-24 (Keith, J., concurring in part, dissenting in part).

53. *Id.* at 625 (Keith, J., concurring in part, dissenting in part) (noting the district court's finding of fact).

54. *Id.* at 624 (Keith, J., concurring in part, dissenting in part).

55. *Id.* (Keith, J., concurring in part, dissenting in part). In contrast to the career encouragement superiors gave the harasser, they told the plaintiff that she had "set her goals too high." *Id.* at 625.

56. *Id.* at 624 (Keith, J., concurring in part, dissenting in part).

57. *Rabidue*, 584 F. Supp. at 422, 432. While *Rabidue* sued under several theories for violations of Title VII, the Equal Pay Act, and Michigan's Elliot-Larsen Act, Judge Newblatt devoted about half of his opinion to her sexual harassment claim. *Id.* at 427-33.

On appeal, the Sixth Circuit remarked that this was the first case the court of appeals had heard that dealt with "an alleged sexually discriminatory work environment which had not resulted in a tangible job detriment."<sup>58</sup> The court held that being offended at work is not enough; a plaintiff must be exposed to conditions that would "affect seriously the psychological well-being of [a] reasonable person under like circumstances."<sup>59</sup> The circuit court noted that the EEOC's approach to investigating sexual harassment claims is to look, case by case, at the totality of circumstances, including the context in which the complained-of incidents occurred.<sup>60</sup>

Observing that the trial court had "broad discretion" to assess facts gleaned from a similarly individualized inquiry, the court quoted the district judge with approval:

[I]n some work environments, humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations and girlie magazines may abound. Title VII was not meant to—or can—change this. It must never be forgotten that Title VII is the federal court mainstay in the struggle for equal employment opportunity for the female workers of America. But it is quite different to claim that Title VII was designed to bring about a magical transformation in the social mores of American workers.<sup>61</sup>

In addition to considering the "prevailing work environment" in hostile environment claims, courts should, the majority in *Rabidue* wrote, look at the backgrounds and experiences of the plaintiff, co-workers, and supervisors.<sup>62</sup>

Dissenting from the majority opinion on the plaintiff's hostile work environment claim, Judge Keith argued that the outlook the court approved had the effect of endorsing standards for reasonable behavior that had been "fashioned by the offenders."<sup>63</sup> He further criticized the majority for its

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He described sexual harassment as probably "the hottest present day Title VII issue." *Id.* at 427 n.29.

58. *Rabidue*, 805 F.2d at 619.

59. *Id.* at 620.

60. *Id.* at 621 n.5.

61. *Id.* at 620-21.

62. *Id.* at 620.

63. *Id.* at 626 (Keith, J., concurring in part, dissenting in part).

mandate to consider the "prevailing work environment," "the lexicon of obscenity that pervaded the environment both before and after plaintiff's introduction into its environs," and plaintiff's reasonable expectations upon "voluntarily" entering that environment . . . . The majority suggests through these factors that a woman assumes the risk of working in an abusive, anti-female environment. Moreover, the majority contends that such work environments somehow have an innate right to perpetuation and are not to be addressed under Title VII.<sup>64</sup>

Judge Keith was also disturbed by the majority's suggestion that the backgrounds of a plaintiff's co-workers and supervisors affect the viability of a hostile work environment claim.<sup>65</sup> He believed that standard would create an unworkable "morass of perspectives" for courts to balance and would tend to lock women in workplaces with less-sophisticated workers into offensive, anti-female environments.<sup>66</sup>

Two cases more recently decided in the Sixth Circuit, *Williams v. General Motors Corp.*<sup>67</sup> and *Jackson v. Quanex Corp.*,<sup>68</sup> update the debate ignited by *Rabidue*.<sup>69</sup> In *Williams*, the court of appeals reversed the district court's summary judgment for the employer in a female tool crib employee's claim of a sexually hostile work environment, and it explicitly rejected the notion that a higher level of offensive behavior must be endured by Title VII plaintiffs who work in blue-collar jobs.<sup>70</sup>

64. *Id.* (Keith, J., concurring in part, dissenting in part).

65. *Id.* at 627 (Keith, J., concurring in part, dissenting in part).

66. *Id.* (Keith, J., concurring in part, dissenting in part). *Cf.* Marion Crain, *Women, Labor Unions, and Hostile Work Environment Sexual Harassment: The Untold Story*, 4 TEX. J. WOMEN & L. 9, 37-42 (1995) (describing themes that recur when unions argue in defense of blue-collar harassers at arbitration hearings on discipline, such as "It's a Man's World"—the workplace should not have to change to accommodate the entry of women—and "The Victim Assumed the Risk"—it is well-known that sexualization is prevalent in the trades).

67. 187 F.3d 553 (6th Cir. 1999), *reh'g denied*, No. 97-3351, 1999 U.S. App. LEXIS 26482 (6th Cir. Sept. 30, 1999).

68. 191 F.3d 647 (6th Cir. 1999).

69. *See* discussion *supra* Part II.A.

70. *Williams*, 187 F.3d at 564. "[The plaintiff's] attorney asked the court whether the conduct alleged in this case would be tolerated in our courthouses. We believe it would not, and we reject the view that the *standard* for sexual harassment varies depending on the work environment." *Id.*

Plaintiff Marilyn Williams, a more than thirty-year veteran of General Motors, objected to the conditions she faced after she began working on the midnight shift.<sup>71</sup> Her work was sabotaged.<sup>72</sup> A co-worker constantly used "the 'F-word,'" called her "slut," and announced, "I'm sick and tired of these fucking women."<sup>73</sup>

Williams' supervisor treated her in a sexually suggestive manner.<sup>74</sup> He interrupted his conversation with one of her co-workers to look at Williams' breasts, then commented, "You can rub up against me anytime."<sup>75</sup> A few days later, he walked up behind her while she was bending over and invited her to back up into him.<sup>76</sup> When Williams wrote the words "Hancock Furniture Company" on a piece of paper, her supervisor placed his arm around her neck, put his face against hers, and told her, "You left the dick out of the hand."<sup>77</sup>

The district court found that the incidents Williams reported were offensive, but not severe or pervasive enough to create a hostile work environment.<sup>78</sup> On appeal, the Sixth Circuit criticized the district judge for his piecemeal analysis of Williams' claim.<sup>79</sup> He had clustered her eighteen specific complaints into four narrow categories, then assessed and dismissed each category, standing alone, for not rising to the level of an actionable hostile work environment.<sup>80</sup> The court cited *Oncale* as reaffirmation for the principle that courts must look at the totality of the circumstances—that is, look at the cumulative effect of all the alleged incidents.<sup>81</sup>

The court cautioned that consideration of context and the totality of circumstances does not mean that courts can excuse

71. *Id.* at 559.

72. *Id.* Williams once arrived at work to find a box of office supplies glued to her desk, was hit by a thrown box on another occasion, and was once locked in her work area—actions that the district court dismissed as pranks. *Id.* at 562. At times, co-workers blocked Williams' access to work areas with supply buggies and stacked materials. *Id.* at 559.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 560.

79. *Id.* at 562.

80. *Id.* at 562, 570.

81. *Id.* at 562.

hostile work environment harassment because of "long-standing or traditional hostility toward women" in a particular work setting.<sup>82</sup> Specifically, in blue-collar settings like the one in which Williams worked, courts should not require that plaintiffs prove conduct that is significantly more hostile than that which is considered actionable in other work environments:

We do not believe that a woman who chooses to work in the male-dominated trades relinquishes her right to be free from sexual harassment; indeed, we find this reasoning to be illogical, because it means the more hostile the environment, and the more prevalent the sexism, the more difficult it is for a Title VII plaintiff to prove that sex-based conduct is sufficiently severe or pervasive to constitute a hostile work environment. Surely women working in the trades do not deserve less protection from the law than women working in a courthouse.<sup>83</sup>

Judge Ryan filed a lengthy dissent.<sup>84</sup> He asserted that neither Congress in enacting Title VII, nor the Supreme Court in interpreting it, intended to "force a heightened level of civility upon the blue collar workplace."<sup>85</sup>

The shop floor is a rough and indelicate environment in which finishing school manners are not the behavioral norm. When a female of ordinary civility, sensibilities, and morality walks into a work milieu that may be tastelessly suffused with rudeness, personal insensitivity, crude behavior, and locker room language, she must do so with the understanding that Congress has not legislated against such behavior and such a workplace environment.<sup>86</sup>

As the majority had done, Judge Ryan cited *Oncale* as support for his position, and he read the Court's emphasis on the importance of considering the social context of workplace behavior as endorsement for the "common sense idea" of

82. *Id.*

83. *Id. But cf. Burnett v. Tyco Corp.*, 203 F.3d 980, 981, 985 (6th Cir. 2000) (affirming summary judgment for employer when the plant personnel manager had lifted up the plaintiff's tank top and bra strap and placed a pack of cigarettes and a lighter in her undergarments, and when another female employee asserted that it was "more like a whorehouse than a plant").

84. *Williams*, 187 F.3d at 569-72 (Ryan, J., dissenting).

85. *Id.* at 572 (Ryan, J., dissenting).

86. *Id.* at 571 (Ryan, J., dissenting).

factoring in the coarseness of the workplace when assessing environmental claims under Title VII.<sup>87</sup>

Notwithstanding Judge Ryan's dissent in *Williams*, the Sixth Circuit extended the logic of *Williams* to racially hostile blue-collar work environments in *Jackson v. Quanex Corp.*<sup>88</sup> Linda Jackson, the African-American female plaintiff, worked in various capacities—laborer, saw operator, furnace operator, tub cleaner—in a plant that manufactured steel tubing.<sup>89</sup> On her first day on the job, Jackson overheard supervisors discussing the possibility of placing stars on their helmets for each minority fired.<sup>90</sup> Language in the plant was rife with racial epithets.<sup>91</sup> Graffiti in the lavatories included comparisons of the penis sizes of white and black men and depictions of lynchings accompanied by the slogan—"KKK is back."<sup>92</sup>

In the face of this evidence, the district court granted the defendant judgment as a matter of law at the conclusion of the trial, reasoning that racially harassing incidents at Quanex were so commonplace, they had become the "conventional conditions on the factory floor."<sup>93</sup> Reversing, the court of appeals denounced the idea that the prevalence of discriminatory conduct can convert it into the accepted norm for a workplace.<sup>94</sup> In a unanimous opinion by a panel of three judges that did not include the authors of the majority and dissenting opinions in *Williams*, the court declared that "the district court was wrong

87. *Id.* (Ryan, J., dissenting). In the *Oncale* decision, the Supreme Court expressed confidence that judges and juries would use their "common sense" to determine the merit of hostile work environment claims. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998).

88. 191 F.3d 647 (6th Cir. 1999).

89. *Jackson*, 191 F.3d at 650.

90. *Id.* at 651. African-American employees made up just five percent of the plant population (18 of 349 employees). *Id.* at 650.

91. *Id.* at 651-55. Caucasian workers called African-American employees "colored" and "niggers," and incorporated the latter slur into additional expressions they used in the plant—"nigger rigging," "nigger lover," "stupid damn nigger," "stupid street nigger," "nigger sucker," and more. *Id.*

92. *Id.* at 652.

93. *Id.* at 660.

94. *Id.* at 662. One commentator has referred to this line of reasoning as the "*Robidue* problem"—"allowing currently obscene workplaces to stay that way." Cahill, *supra* note 43, at 1152.

to condone continuing racial slurs and graffiti on the grounds that they occurred in a blue collar environment."<sup>95</sup>

The position taken by the district court seemed "inclined, incredibly, to condone racially harassing conduct the more prevalent that conduct becomes."<sup>96</sup> The court read the evidence as showing the defendant company had adopted the attitude that because "everyone knew the plant was a 'redneck' environment," African-American employees working at Quanex had to accept racial harassment; presumably, the plant's management thought the minority workers had assumed the risk of being offended at work.<sup>97</sup> Drawing a parallel to the position the circuit had taken on women entering the trades in *Williams*, the court stated, "[W]e do not believe that an African American who chooses to work in a Caucasian-majority factory relinquishes her right to be free from racial harassment."<sup>98</sup>

*B. Tenth Circuit: Looking at the Coarseness Factor from Both Sides*

Like the Sixth Circuit, the Tenth Circuit has litigated hostile work environment claims that provided opportunities to apply the coarseness factor.<sup>99</sup> In *Gross v. Burggraf Construction Co.*,<sup>100</sup> the Tenth Circuit, ultimately relying on its "totality of the circumstances" analysis, affirmed summary judgment for the employer on a sexual harassment claim.<sup>101</sup> There, the plaintiff was a female truck driver.<sup>102</sup> Her boss called her "dumb" and a "cunt"; he was reported to have said to another worker, "I hate that fucking cunt," referring to the plaintiff.<sup>103</sup> He announced

95. *Jackson*, 191 F.3d at 662.

96. *Id.* at 660.

97. *Id.* at 666; *cf.* *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1359 (11th Cir. 1982) (finding that the work environment at a car dealership was racially hostile in a case in which the defendant characterized "nigger-rigged" as an accepted expression in the automobile business, and a manager had advised the plaintiff that racial slurs were "just something a black man would have to deal with in the South").

98. *Jackson*, 191 F.3d at 666.

99. *See, e.g.*, *Gross v. Burggraf Constr. Co.*, 53 F.3d 1531 (10th Cir. 1995) (sexually hostile work environment); *Bolden v. PRC Inc.*, 45 F.3d 545 (10th Cir. 1994) (racially hostile work environment).

100. 53 F.3d 1531 (10th Cir. 1995).

101. *Gross*, 53 F.3d at 1548.

102. *Id.* at 1534.

103. *Id.* at 1536, 1539.

over the CB radio, "[S]ometimes, don't you just want to smash a woman in the face?" when he was annoyed with an aspect of Gross' work performance.<sup>104</sup> Not surprisingly, perhaps, only two women out of forty hired completed the construction season under his supervision.<sup>105</sup>

Evaluating Gross's claim of sexual harassment in light of the blue-collar setting where the events occurred, the court determined that the conduct and language directed toward her were not offensive or unacceptable.<sup>106</sup> Citing *Rabidue*, the court reasoned that Title VII was not meant to, and should not be used to, change a rough hewn and vulgar work environment.<sup>107</sup> The plaintiff helped defeat her claim, in the opinion of the court, by using vulgarities on the job site herself, which demonstrated her lack of sensitivity to crude language.<sup>108</sup>

In *Bolden v. PRC Inc.*,<sup>109</sup> the plaintiff's hostile work environment claim also failed in part because of his disposition and conduct—not because he had joined in the vulgarities, but because he was "sensitive and serious" and did not share the "crude and rude" attitude of his co-workers.<sup>110</sup> James Bolden was the only African-American working in the PRC electronics shop.<sup>111</sup> The other electricians told him to watch out because they knew people in the Ku Klux Klan; they used the term

104. *Id.* at 1536.

105. *Id.* at 1536. The court found that the "mere fact" that only two women stayed was in no way probative of a hostile work environment for women at the construction site because nothing had been put into evidence that would provide anything but benign reasons for the other women's departure. *Id.* at 1543. For unskilled to semi-skilled work in the summer of 1990, the defendant employer paid \$12.50 to \$13.50 an hour. *Id.* at 1534-35. This was more than three-and-a-half times the minimum wage that summer, \$3.80. Dept. of Labor, Federal Minimum Wage Rates Under the Fair Labor Standards Act, at <http://www.dol.gov/esa/public/minwage/chart.htm> (last visited Nov. 8, 1999).

106. *Gross*, 53 F.3d at 1538.

107. *Id.*

108. *Id.* But see *Galloway v. GM Serv. Parts Operations*, 78 F.3d 1164, 1167 (7th Cir. 1996) (pointing out that "there is no principle of law, or for that matter of psychology, that decrees that the use of bad language automatically demonstrates the user's insensitivity to like language directed against himself or herself"); *Jensen v. Eveleth Taconite Co.*, 824 F. Supp. 847, 880 (D. Minn. 1993) (noting that while both male and female mine workers cursed and used phrases with sexual reference, only the men referred to opposite sex co-workers in terms of their body parts), *remanded for a new trial on other grounds*, 130 F.3d 1287 (8th Cir. 1997).

109. 43 F.3d 545 (10th Cir. 1994).

110. *Bolden*, 43 F.3d at 548, 551.

111. *Id.* at 550.



“nigger”; they expelled gas at him; and they modified his chair so the back of the chair would fall off when Bolden leaned on it.<sup>112</sup> One co-worker drew a sad face cartoon with the legend, “Junior makes the same pay as I do,” referring, the plaintiff believed, to him.<sup>113</sup>

The court of appeals affirmed the district court’s grant of summary judgment to the employer.<sup>114</sup> It viewed most of the incidents to be general harassment because most of the names Bolden’s co-workers called him—“dickhead,” “dumbass,” “faggot,” “asshole,” and “fool”—were generic, and racial comments were sporadic.<sup>115</sup> The court observed that “[t]he law should not intervene where someone’s feelings merely are hurt.”<sup>116</sup> Co-workers treated Bolden in a way that was “commonplace of the blue collar environment of the electronics shop.”<sup>117</sup> The “derisive environment in the workshop was universal”; therefore, Bolden’s claim of a hostile environment under Title VII did not rise to an actionable level.<sup>118</sup>

The Tenth Circuit has looked at the coarseness factor from both sides; that is, while most courts discuss the work setting only when it is coarse, this circuit court has, on at least one occasion, lowered the threshold of offensive behavior for a plaintiff because she did *not* work in a coarse and boorish work setting.<sup>119</sup> In *Smith v. Norwest Financial Acceptance, Inc.*,<sup>120</sup> plaintiff Debbie Smith was an accounts service representative in the small Casper, Wyoming, branch office of a mortgage company.<sup>121</sup> Over a period of twenty-three months, her male supervisor made six offensive statements to her.<sup>122</sup> For example, he told her to “get a little this weekend” so she would “come back in a better mood.”<sup>123</sup> On another occasion the supervisor

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112. *Id.*

113. *Id.* at 551.

114. *Id.*

115. *Id.* at 549, 551.

116. *Id.* at 554 (quoting *Roberts v. Saylor*, 637 P.2d 1175, 1179 (Kan. 1981), while addressing Bolden’s claim of the tort of outrage).

117. *Id.* at 550.

118. *Id.* at 551.

119. *See Smith v. Northwest Fin. Acceptance, Inc.*, 129 F.3d 1408, 1414 (10th Cir. 1997).

120. 129 F.3d 1408 (10th Cir. 1997).

121. *Smith*, 129 F.3d at 1412.

122. *Id.* at 1415.

123. *Id.* at 1414.

told Smith she had to be "a sad piece of ass" if she could not "keep a man."<sup>124</sup>

The plaintiff was awarded over \$93,000 in damages and attorney's fees and costs by the district court, and the defendants, denied judgment as a matter of law or a new trial, appealed to the Tenth Circuit.<sup>125</sup> The court of appeals found a legally sufficient basis for the lower court's finding of a sexually hostile work environment.<sup>126</sup> In assessing, as directed by the Supreme Court in *Harris*, all the circumstances, the circuit court stated it must examine the setting and context in which offensive behavior takes place.<sup>127</sup>

The court found it significant that in a small office with no partitions and walls, the supervisor's comments to Smith could be overheard by co-workers, thus increasing her humiliation.<sup>128</sup> It considered, but rejected, the possibility that participation in casual joking in the office by the plaintiff mitigated the harasser's behavior.<sup>129</sup> Then the court distinguished the employment setting where Smith worked from the employment setting of the plaintiff in *Gross v. Burggraf Construction Co.*: "This is not a factual scenario like that . . . where the rough and tumble surroundings of the construction industry can make vulgarity and sexual epithets common and reasonable conduct."<sup>130</sup> Thus, the Tenth Circuit has consciously provided more protection to the hypothetical woman "working in the courthouse" than the woman "working in the trades."<sup>131</sup>

### *C. Other Courts' Use of the Coarseness Factor*

The Fifth Circuit examined a racially hostile work environment in a blue-collar setting in the early case of *Vaughn v. Pool Offshore Co.*<sup>132</sup> The supervisor and co-workers of Dennis Vaughn, an African-American oil rig roustabout working off the

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124. *Id.*

125. *Id.* at 1412.

126. *Id.* at 1414.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Williams v. Gen. Motors Corp.*, 187 F.3d 553, 564 (6th Cir. 1999).

132. 683 F.2d 922 (5th Cir. 1982).

Louisiana coast, called him “nigger,” “coon,” and “black boy.”<sup>133</sup> On different occasions, the other crew members stripped him and coated his genitals with grease; threw ammonia on him while he showered; and poured hot coffee in his back pocket.<sup>134</sup> When the crew viewed a television news report of a shooting, one of Vaughn’s co-workers commented to laughter from the group, “That’s just like a nigger; give him a gun and he shoots anything that moves.”<sup>135</sup>

The court recognized that the “pranks” played on Vaughn were typically paired with racial slurs and that Vaughn did not reciprocate.<sup>136</sup> Nevertheless, it discounted the “unpleasantries” he suffered as part of the total “life on the rig,” reasoning they were associated with male horseplay that was not out of place in that crude environment.<sup>137</sup>

The Seventh Circuit case of *Carr v. Allison Gas Turbine Division*<sup>138</sup> dealt with the claim of Mary Carr, the first female to enter the tinsmith shop at General Motors.<sup>139</sup> Over the next five years (until she quit) her male co-workers did, among other things, the following: referred to her as “whore,” “cunt,” and “split tail”; painted her toolbox pink and labeled it “cunt”; cut the seat out of her overalls; hid and stole her tools and toolbox; and hung nude pinups around the work area.<sup>140</sup> A co-worker exposed himself to her and suggested she might have to give him “mouth to dick” resuscitation.<sup>141</sup> Over a ten-minute period, he was clocked using the word “fuck” fifty to sixty times.<sup>142</sup> In a particularly cruel twist, when the plaintiff’s foster son was executed for murder, one of her co-workers told her he would be happy to pay the electric bill for it.<sup>143</sup>

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133. *Vaughn*, 683 F.2d at 924.

134. *Id.* at 923. The court referred to these activities as “oil patch past-time[s][sic].” *Id.* at 923 n.1.

135. *Id.* at 924.

136. *Id.* at 925.

137. *Id.*

138. 32 F.3d 1007 (7th Cir. 1994).

139. *Carr*, 32 F.3d at 1009.

140. *Id.*

141. *Id.* at 1010.

142. *Id.*

143. *Id.* at 1011.

Carr's supervisor responded to the comments he heard by chuckling and biting down on his pipe.<sup>144</sup> When Carr met with her supervisor's boss to complain, he told her she needed to work harder than the men to prove to them that she could do the job.<sup>145</sup> At the bench trial of her hostile work environment case, the district judge approvingly asked her supervisor, "So you, more or less, left these gals alone to develop their own methods of coping on the job?"<sup>146</sup> A female welder who worked near the tinsmiths' area testified that she found Carr to be a vulgar and unladylike "tramp" because of the jokes and language she used.<sup>147</sup> The welder said she had no problems working with the men, but admitted she had to fend them off at times by zapping them with her welding arc.<sup>148</sup>

After a bench trial, the district judge rendered judgment for the defendant.<sup>149</sup> He found that Carr created her own problems; had she been ladylike, like the welder next door, the men would not have behaved as they did.<sup>150</sup> The court of appeals reversed, crediting Carr's explanation that she had tried to fit in and be "one of the boys," but noting that even if her explanation was not plausible, it was hard to imagine a situation in which male factory workers were forced to sexually harass a lone female

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144. *Id.* at 1010.

145. *Id.* at 1012.

146. *Id.*

147. *Id.* at 1010.

148. *Id.*

149. *Id.* at 1008.

150. *Id.* at 1011. The district judge seemed to have expected that Carr, alone in a shop full of men, would adhere to the standards that were in place during the "Rosie the Riveter" era fifty years before, even though women at that time temporarily held most of the civilian blue-collar jobs:

Women today are engaging in four out of five jobs and tasks for which only men have been considered capable. [Y]oung women . . . are welders, riveters, machinists . . . and [are] doing other difficult tasks which will help Uncle Sam win through to victory . . . . The modern girl is throwing herself into a new atmosphere where men, who are uncouth and rough in their expressions, swear and bark out their dirty stories. Many of these men are experts in their attempts to break down your girlish reserve. They will try their stories on you . . . at the factory . . . . There will be swearing, but you must not permit even one expression to find a snug little nest in your mind.

BERTRAND WILLIAMS, *CHRISTIAN GIRL'S PROBLEMS* 42-44 (1943).

worker out of "self-defense."<sup>151</sup> At any rate, Carr's conditions of employment had been unlawfully affected.<sup>152</sup>

One circuit judge dissented, pointing out that tinnners must rely on each other to get their jobs out and that they probably thought GM was overlooking Carr's shortcomings (for example, the absenteeism that had been caused largely by the problems with her foster son) because she was a woman.<sup>153</sup> Because Carr had "actively participated in foul, vulgar shop talk with a rough crowd of tinnners," Judge Coffey believed that the defendants should not be held accountable for the resulting working conditions.<sup>154</sup>

Even the majority missed a point when it declared that "[t]he U.S. Navy has been able to integrate women into the crews of warships; General Motors should have been able to integrate one woman into a tinsmith shop."<sup>155</sup> Because the lone worker has no support group, incorporating a single "non-traditional" employee into a work setting is typically much more difficult than bringing several such employees into the environment at the same time.<sup>156</sup>

151. *Carr*, 32 F.3d at 1011.

152. *Id.*

153. *Id.* at 1015 (Coffey, J., dissenting).

154. *Id.* at 1016 (Coffey, J., dissenting).

155. *Id.* at 1012.

156. *See Jensen v. Eveleth Taconite Co.*, 824 F. Supp. 847, 881 n.82 (D. Minn. 1993) (noting that when women are a "rarity" in the workplace, "men pay more attention to any one woman's presence and scrutinize her more intensely"); *cf. Martha Chamallas, The New Gender Panic: Reflections on Sex Scandals and the Military*, 83 MINN. L. REV. 305, 327 (1998) (reporting that when women are dispersed in a organization, their ability to affect the culture of the work environment is minimal). A number of courts have commented that employers who place women in previously all-male work settings have special responsibilities. *See, e.g., Hurley v. Atl. City Police Dep't*, 933 F. Supp. 398, 401 (D.N.J. 1996) (denying motion for new trial following jury verdict for plaintiff on female police sergeant's hostile work environment claim and noting that "[a]s women increasingly enter workplaces historically reserved for men . . . [a]n employer cannot sit back and adopt a 'boys will be boys' attitude . . . ; it must move promptly and forcibly to make it clear . . . that conduct which demeans women or makes them feel unwelcome will not be tolerated"); *Konstantopoulos v. Westvaco Corp.*, 893 F. Supp. 1263, 1277 (D. Del. 1994) (rendering judgment for a female laborer in a box manufacturing plant on a hostile environment claim and observing that "defendant did not prepare its employees . . . to work in an environment where men were working for the first time with women and where women were working for the first time with machinery"); *Jensen*, 824 F. Supp. at 888 (finding that sexual harassment had been "standard operating procedure" at the mine and noting that "in work places which have been traditionally male and where females constitute a small minority of the employees, employers may have an

*D. Additional Observations*

The work setting must not be a critical consideration for courts when they assess the "totality of the circumstances"; other than in the blue-collar cases, the work setting in which harassment takes place is only occasionally mentioned in the reasoning of courts.<sup>157</sup> A woman whose work was processing securities transactions filed suit in *Gleason v. Mesirov Financial, Inc.*,<sup>158</sup> a Seventh Circuit case. Superiors had specifically counseled her boss that his office behavior of yelling and slamming down telephones "was not considered appropriate in the . . . *sedate and professional surroundings* at Mesirov."<sup>159</sup>

The plaintiff complained that her boss, Greg Novak, referred to female customers as "bitchy," "dumb," or "suffering from PMS."<sup>160</sup> He commented to one female employee about the size of her breasts, told another he liked her in shorter skirts, and stood up to "ogle" women who walked past.<sup>161</sup> Novak once put an ad for a nudist camp on the plaintiff's desk and informed her that he had spent the weekend there.<sup>162</sup> He told her tearfully on another occasion that he had dreamed of holding hands with her.<sup>163</sup> When she became pregnant, he persisted in commenting on her pregnancy, even after she requested that he stop.<sup>164</sup>

Dismissing the plaintiff's suit as a claim of "low-level harassment" that was not actionable, the court proclaimed that "a certain amount of 'vulgar banter, tinged with sexual

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increased obligation to create environments which are safe for all employees").

157. See, e.g., *Fall v. Ind. Univ. Bd. of Trustees*, 12 F. Supp. 2d 870 (N.D. Ind. 1998). The setting of the harassment—a university chancellor's office—was discussed by the court, but only as support for the idea that the harasser's actions were more threatening in a private, isolated setting and that mere romantic misunderstandings are more plausible in open, social settings. *Id.* at 878. In *Zastrow v. Ikegame Electronics, Inc.*, 75 Fair Emp. Prac. Cas. (BNA) 929, 931 (D.N.J. 1997), the setting was mentioned, but for nearly the opposite reason as in *Fall*; the *Zastrow* court found it more serious that the harassment took place at a public business reception instead of in an intimate setting because the plaintiff's romantic interest and body language could have been more easily misconstrued by the defendant had they been in a private setting. *Id.*

158. 118 F.3d 1134 (7th Cir. 1997).

159. *Gleason*, 118 F.3d at 1136 (emphasis added).

160. *Id.* at 1137.

161. *Id.*

162. *Id.* The court pointed out that he really had gone to the camp. *Id.*

163. *Id.*

164. *Id.*

innuendo' is inevitable in the *modern* workplace, particularly from 'coarse and boorish workers' such as Novak."<sup>165</sup> The adjective "blue-collar" could be substituted for "modern," and the phrase would be completely at home in any of the coarse workplace hostile environment opinions, despite the fact that this was a "professional" workplace.<sup>166</sup>

In another case involving a genteel work setting, *Fox v. Ravinia Club, Inc.*,<sup>167</sup> the plaintiff became membership secretary for a private club in Atlanta, Georgia, after transferring from another part of the country where she had held the same type post.<sup>168</sup> Her immediate supervisor said to her, "You cold northern bitch. Why don't you give us southern boys a break and say yes once in a while?"—a comment the court said was not "necessarily" sexual.<sup>169</sup> The supervisor suggested that she hang a red light over her desk to attract members.<sup>170</sup> His superior told the plaintiff she could sleep with someone to get a promotion, could sleep with prospective members to sign them up, and should wear "knee pads" to get members, which she understood to mean providing oral sex.<sup>171</sup> The court did not credit, and did not describe, the plaintiff's "more outrageous" claims of harassment.<sup>172</sup>

The court did not conclude that the threshold for actionability was low because these events happened in an upscale work setting; the private club setting was not mentioned at all in the court's reasoning.<sup>173</sup> Acknowledging that the casual atmosphere and loose conversation in the office had sexual implications, the court nevertheless rendered judgment in favor of the defendant.<sup>174</sup> Finding "that the plaintiff is 'straight-laced' and professional in her work," while her boss had a "more informal

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165. *Id.* at 1144 (adopting phrases used in *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430-31 (7th Cir. 1995)) (emphasis added); *cf.* *Bolden v. PRC, Inc.*, 43 F.3d 545, 548 (10th Cir. 1994) (describing plaintiff's blue-collar co-workers as "boorish churls").

166. *See supra* Part II.A-C.

167. 761 F. Supp. 797 (N.D. Ga. 1990), *aff'd*, 948 F.3d 731 (11th Cir. 1991).

168. *Fox*, 761 F. Supp. at 798.

169. *Id.* at 800.

170. *Id.* at 799.

171. *Id.*

172. *Id.* at 800.

173. *Id.* at 801.

174. *Id.* at 801-02.

and relaxed style," the court implied that the plaintiff was oversensitive.<sup>175</sup>

In blue-collar cases, judges are much more apt to make remarks about the workplace setting, and they often compare the environment in question with an unrealistically pristine environment such as a "Victorian salon,"<sup>176</sup> a "ballroom,"<sup>177</sup> or a "church."<sup>178</sup> Sometimes judges chide hostile work environment plaintiffs for being priggish and for having expectations of their workplaces that would only be met in an unattainably pure setting.<sup>179</sup> Incongruously, the courts' comments about the expected behavior of blue-collar workers in the context of their peaceful, day-to-day work activity echo comments that have been made about the expected behavior of pickets during the strife of a work stoppage.<sup>180</sup>

Judges, as a group, have a reputation of being far removed from the working class; some may relate sympathetically to corporate defendants while generalizing about blue-collar

175. *Id.* at 799.

176. *See Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1017 (8th Cir. 1988) (observing that "Title VII does not mandate an employment environment worthy of a Victorian salon"). Victorian references are particularly common in hostile work environment opinions. *See, e.g., DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 593 (5th Cir. 1995) (admonishing that "a less onerous standard of liability would attempt to insulate women from everyday insults as if they remained models of Victorian reticence"); *Swentek v. USAIR, Inc.*, 830 F.2d 552, 562 (4th Cir. 1987) ("The workplace is not a Victorian parlor, and the courts are not the arbiters of its etiquette."). Such observations "are couched in decidedly gendered terms that conjure up images of fragile and helpless women who are ill-suited for the rough-and-tumble nature of the [male] world of work." Crain, *supra* note 66, at 38.

177. *See Hall*, 842 F.2d at 1017-18 ("One may well expect that in the heat and dust of the construction site language of the barracks will always predominate over that of the ballroom.").

178. *See Reynolds v. Atl. City Conv. Ctr.*, 53 Fair Emp. Prac. Cas. (BNA) 1852, 1866 (D.N.J. 1990) ("[W]e must discount the impact of . . . obscenities in an atmosphere otherwise pervaded by obscenity. These gestures and remarks were not made in church.").

179. *See Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 431 (7th Cir. 1995) (asserting that "only a woman of Victorian delicacy—a woman mysteriously aloof from contemporary American popular culture in all its sex-saturated vulgarity—would find [the defendant's behavior] . . . distressing"). *But cf. Andrews v. City of Philadelphia*, 895 F.2d 1469, 1486 (3d Cir. 1990) ("Although defendants' counsel vigorously argues that a police station need not be run like a day care center, it should not . . . have the ambience of a nineteenth century military barracks.").

180. *See Republic Creosoting Co.*, 19 N.L.R.B. 267, 288 (1940) ("[T]he emotional tension of a strike almost inevitably gives rise to a certain amount of disorder and . . . conduct on a picket line cannot be expected to approach the etiquette of the drawing room . . .").



plaintiffs.<sup>181</sup> Even well-meaning academic commentators reveal some class bias when addressing hostile working environments.<sup>182</sup> After analyzing several cases, the writers of one law review article asserted, "Even though these examples involved *blue collar workers*, the problem of sexual harassment permeates all businesses and reaches upper management. No company or supervisor can prudently ignore the problem."<sup>183</sup>

### III. INSIGHTS ON HOSTILE ENVIRONMENTS FROM THE SUPREME COURT

Having surveyed how some of the lower courts view blue-collar settings and how they apply the coarseness factor, it is helpful to return to the Supreme Court cases on hostile work environment and examine them more closely.<sup>184</sup>

#### A. Meritor Savings Bank v. Vinson<sup>185</sup>

Mechelle Vinson advanced from teller to head teller to assistant branch manager at Meritor Savings Bank.<sup>186</sup> After she was terminated for absence, Vinson alleged that Sidney Taylor, a vice president of the bank and her immediate supervisor, made sexual demands on her and publicly fondled her throughout most of her four years of employment.<sup>187</sup> She had, she said, submitted to his sexual demands rather than risk losing her job.<sup>188</sup> Vinson's promotions at the bank were based on merit, and she did not lose her job when the sexual activity with

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181. See, e.g., Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 784 (1995) (observing that judges have traditionally been selected from "elite political and professional circles"); Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1206 n.105 (1990) (noting, while commenting on *Rabidue*, that "[i]t is at least arguable that a jury, composed as it usually is of non-elite citizens, would be a better identifier of societal consensus than a judge").

182. See, e.g., Barry S. Roberts & Richard A. Mann, *Sexual Harassment in the Workplace: A Primer*, 29 AKRON L. REV. 269, 279 (1996).

183. *Id.* (emphasis added).

184. See discussion *supra* Part II.

185. 477 U.S. 57 (1986).

186. *Vinson*, 477 U.S. at 59-60.

187. *Id.* at 60.

188. *Id.*

Taylor ended.<sup>189</sup> Her claim was not *quid pro quo*; it fit instead into the newer variation of sexual harassment the EEOC recognized, a hostile or offensive working environment.<sup>190</sup>

Following an eleven-day bench trial, the district court denied relief to Vinson.<sup>191</sup> Because neither advancement nor continued employment at the bank were predicated upon Vinson's having sex with Taylor, the court found no violation of Title VII.<sup>192</sup> The D.C. Circuit reversed the lower court, holding that harassment need not affect economic benefits to be actionable.<sup>193</sup>

The Supreme Court affirmed the court of appeals, noting that the statute does not limit discrimination to actions with economic or tangible effects on the worker; rather, "[t]he phrase 'terms, conditions, or privileges of employment' evinces a congressional intent to 'strike at the entire spectrum of disparate treatment of men and women' in employment."<sup>194</sup> The Court (with Justice Rehnquist delivering its opinion) went on to approve the guidelines established by the EEOC and the foundation of case law behind them.<sup>195</sup>

However, not every instance of objectionable conduct qualifies as unlawful harassment; the Court stated that harassing conduct must be "severe or pervasive" enough "to alter the conditions of [the victim's] employment."<sup>196</sup> The Court further instructed courts to evaluate "the record as a whole" and consider "the totality of circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred."<sup>197</sup>

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189. *Id.* at 60-61.

190. *Id.* at 62.

191. *Id.* at 60-61.

192. *Id.* at 61.

193. *Id.* at 62-63.

194. *Id.* at 64.

195. *Id.* at 65-67.

196. *Id.* at 67 (quoting *Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)). The Court found Vinson's allegations to be "plainly sufficient to state a claim for 'hostile environment' sexual harassment." *Id.*

197. *Id.* at 69 (quoting EEOC Guidelines, 29 C.F.R. § 1604.11(b) (1985)).

*B. Harris v. Forklift Systems, Inc.*<sup>198</sup>

Teresa Harris was a manager for an equipment rental company.<sup>199</sup> Over the three and a half years she worked at Forklift Systems, company president Charles Hardy made sexually suggestive and gender disparaging remarks to her.<sup>200</sup> He asked her and other female employees to fish coins out of his front pants pocket.<sup>201</sup> When Harris complained to him about his comments and behavior, Hardy expressed surprise, said he was kidding, and apologized.<sup>202</sup> When he began making objectionable comments again, Harris resigned.<sup>203</sup>

Harris sued the company for maintaining an abusive work environment.<sup>204</sup> The district court adopted the findings of the magistrate assigned to the case, who considered it a close call, but found the working environment was not hostile in a way that violated Title VII.<sup>205</sup> Using Sixth Circuit precedent, the magistrate focused on the employment situation's psychological impact on the plaintiff.<sup>206</sup> He found that Hardy's conduct was not extreme enough to create psychological harm and that his conduct should not have interfered with Harris' work performance.<sup>207</sup> In his view, although Hardy's behavior was offensive, it did not "poison" the work environment; the district court agreed.<sup>208</sup> The court of appeals affirmed, and the Supreme Court granted certiorari to resolve a circuit split on whether abusive work environments must injure the victim psychologically to be actionable.<sup>209</sup>

Quoting from its opinion in *Vinson*, the Court, in a unanimous opinion written by Justice O'Connor, stated that a workplace where discriminatory conduct is "sufficiently severe or

198. 510 U.S. 17 (1993).

199. *Harris*, 510 U.S. at 19.

200. *Id.* One example of the latter was, "We need a man as the rental manager." *Id.*

201. *Id.*

202. *Id.*

203. *Id.* The final straw for Harris was a crude comment Hardy made in front of other employees suggesting that she must have promised a customer sexual favors in order to make a deal. *Id.*

204. *Id.*

205. *Id.* at 20.

206. *Id.*

207. *Id.*

208. *Id.* at 19-20.

209. *Id.* at 20.

pervasive to alter the conditions of the victim's employment" creates an abusive working environment, whether the worker suffered tangible psychological harm or not.<sup>210</sup> The Court reemphasized that workplace conduct must be objectively severe enough or pervasive enough to create an environment that a reasonable person would find abusive.<sup>211</sup> In addition, the individual worker must subjectively find the environment abusive; otherwise, there is no alteration of the worker's terms and conditions of employment.<sup>212</sup>

The Court announced that actionability requires more than "any conduct that is merely offensive," but conduct causing "a tangible psychological injury" is not required, either.<sup>213</sup> Determining whether a workplace is abusive requires an examination of all the circumstances.<sup>214</sup>

In an apparent response to the inexactness of the Court's guidance on actionability, Justices Scalia and Ginsburg issued separate concurring opinions.<sup>215</sup> Describing the language of the statute as "inherently vague," Justice Scalia could not suggest more definitive guidance, though he stated the ultimate test is whether an individual's working conditions have been discriminatorily altered.<sup>216</sup> Justice Ginsburg framed the issue as "whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."<sup>217</sup> In her opinion, a hostile work environment plaintiff need only establish that the discriminatory conduct "[made] it more difficult to do the job."<sup>218</sup>

During oral arguments before the Court in *Harris*, Jeffrey P. Minear, representing the EEOC as amicus curiae, argued in support of *Harris*.<sup>219</sup> After stating that Hardy's behavior had

210. *Id.* at 21.

211. *Id.*

212. *Id.* at 21-22.

213. *Id.* at 21.

214. *Id.* at 23. *Harris*' case was remanded for proceedings consistent with the Court's opinion. *Id.*

215. *Id.* at 24-26 (Scalia & Ginsburg, JJ., concurring).

216. *Id.* at 25 (Scalia, J., concurring).

217. *Id.* at 25 (Ginsburg, J., concurring). Justice Ginsburg's version was incorporated in the Court's opinion in *Oncale*. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998).

218. *Harris*, 510 U.S. at 25 (Ginsburg, J., concurring).

219. See U.S. Supreme Court Official Transcript at 20-31, *Harris v. Forklift Sys., Inc.*,

made it more difficult for Harris to do her job in this case, Minear twice asserted that “the ultimate touchstone” is whether the demeaning conduct affects or alters working conditions—the test from *Henson v. Dundee*<sup>220</sup> that the Court had adopted in its *Meritor* opinion.<sup>221</sup> One of the Justices then commented,

I wonder if alter the environment is the happiest way of putting it. It was put that way in *Meritor*, certainly, but *it wouldn't be a defense for the employer* for him to show that he's been doing this for [twenty] years. There's no alteration of the environment. He'd always done that.<sup>222</sup>

Minear agreed that might be true, but suggested the “global” question is whether men and women are treated differently in the workplace.<sup>223</sup> One of the Justices followed up with, “Which really doesn't depend on altered treatment at all, does it?”<sup>224</sup> Minear agreed, and went back to an earlier emphasis on whether the objectionable conduct makes it more difficult for a person to do the job.<sup>225</sup>

The Justices' comments in that exchange seem to suggest disapproval of an assumption of risk or “coming to the nuisance” defense in hostile work environment cases.<sup>226</sup> It is not surprising that the Court did not address an assumption of risk defense in its opinion; if Hardy's behavior at Forklift Systems was as offensive before Harris came on the scene as it was once Harris was there, it had not been made an issue in the case.<sup>227</sup> As in *Meritor*, the opinion in *Harris* defines hostile work environments as situations that alter conditions of employment for the individual plaintiff, not situations that alter the work environment or working conditions as a whole.<sup>228</sup>

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510 U.S. 17 (1993) (No. 92-1168) [hereinafter *Harris* Transcript].

220. 682 F.2d 897, 904 (11th Cir. 1982).

221. *Harris* Transcript, *supra* note 219, at 28.

222. *Id.* at 29 (emphasis added).

223. *Id.*

224. *Id.*

225. *Id.* at 30.

226. See discussion *supra* Part II.A. See generally Cahill, *supra* note 43, at 1134-36.

227. See discussion *supra* Part III.B.

228. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

*C. Oncale v. Sundowner Offshore Services, Inc.*<sup>229</sup>

In contrast to the managerial jobs and relatively genteel employment settings of plaintiffs Vinson and Harris, Joseph Oncale worked in a coarse, blue-collar environment.<sup>230</sup> As a roustabout, he labored in the lowest job classification on an offshore Chevron Oil platform.<sup>231</sup> Oncale claimed, among other things, that a co-worker restrained him in a squatting position while a supervisor unzipped his pants, took out his penis, and laid it on the back of Oncale's head; and that the same two individuals grabbed Oncale as he showered, then violated him with a bar of soap.<sup>232</sup>

When he complained to the company about the harassment and got no relief, Oncale quit and sued Sundowner for maintaining a hostile work environment.<sup>233</sup> Relying on the Fifth Circuit rule that same-sex workplace harassment was not actionable, the district court granted summary judgment for the employer.<sup>234</sup> The court of appeals affirmed.<sup>235</sup>

The Supreme Court reversed, remanding Oncale's case for further proceedings.<sup>236</sup> Writing for a unanimous Court, Justice Scalia held that Title VII, which addresses "the entire spectrum" of disparate treatment problems in the workplace, is broad enough to cover same-sex harassment.<sup>237</sup> Actionability is not limited to harassment inspired by sexual desire; discriminatory harassment that is motivated by other factors, for example, by "general hostility to the presence of women in the workplace," is just as unlawful.<sup>238</sup>

229. 523 U.S. 75 (1998).

230. *Oncale*, 523 U.S. at 77.

231. *Id.*

232. See Christina S. Yager, Note, *Oncale v. Sundowner Offshore Services, Inc.: Judicial Recognition of Same-Sex Sexual Harassment*, 26 N. KY. L. REV. 357 (1999) (referencing the amicus brief of the National Organization on Male Sexual Victimization, Inc. at 3). The Court, for reasons of "brevity and dignity," did not provide details of Oncale's allegations in its opinion. *Oncale*, 523 U.S. at 76-77.

233. *Oncale*, 523 U.S. at 77.

234. *Id.*

235. *Id.*

236. *Id.* at 82.

237. *Id.* at 79-80. The Court provided several rationales for its position; for instance, it analogized this case to racial discrimination cases, noting that the law does not presume that an employer will not discriminate against a same-race employee. *Id.* at 78.

238. *Id.* at 80.

The Court addressed the fear that Title VII could turn into a “general civility code for the American workplace.”<sup>239</sup> First, the law does not unconditionally bar all harassment; harassment that is not discriminatory and not based on a protected classification (for example, sex) is not prohibited by the statute.<sup>240</sup> Adherence to this requirement minimizes the risk that non-meritorious claims will prevail.<sup>241</sup>

Second, additional safeguards prevent the statute from expanding into a civility code.<sup>242</sup> One crucial factor is that the harassment must be so objectively offensive that it “alter[s] the ‘conditions’ of the victim’s employment.”<sup>243</sup> “[G]enuine but innocuous differences” exist in the way men and women interact with members of their own sex and the opposite sex, and Title VII does not reach those differences.<sup>244</sup> Therefore, “ordinary socializing in the workplace—such as male-on-male horseplay or intersexual flirtation” is not banned.<sup>245</sup>

A collateral consideration is that “all the circumstances” should be examined.<sup>246</sup> The viewpoint of a “reasonable person in the plaintiff’s position” should be used to assess the severity of the conduct at issue.<sup>247</sup> The social context in which workplace behavior takes place—“circumstances, expectations, and relationships”—matters.<sup>248</sup> The Court provided an illustration: a professional football coach may smack a player on the behind as he sends him into the game without creating a hostile work environment, even though smacking his secretary (male or

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239. *Id.* The Court addressed this concern in another of its 1998 opinions. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (pointing out that the Court’s “standards for judging hostility are sufficiently demanding to ensure Title VII does not become a general civility code”).

240. *Oncale*, 523 U.S. at 80. Justice Thomas wrote a one-sentence concurrence emphasizing that plaintiffs must demonstrate that the “because of . . . sex” requirement of the statute has been met. *Id.* at 82 (Thomas, J., concurring).

241. *Id.* at 80-81.

242. *Id.* at 81.

243. *Id.* Note the subtle difference in the Court’s recitation of this oft-quoted test in the *Oncale* opinion—the word “conditions” has been given some additional emphasis with quotation marks. *See id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.* at 82.

female) on the behind in the office would be a different matter.<sup>249</sup>

Some commentators have read *Oncale* to widen the circle of liability for hostile work environments.<sup>250</sup> Others believe the Court's opinion provides a sort of high-water line and tacitly encourages lower courts to scrutinize more critically sexual harassment claims.<sup>251</sup> While the issue before the Court in *Oncale* was narrow—same-sex sexual harassment—Justice Scalia's opinion expanded upon general principles and legal standards for sexually hostile work environments.<sup>252</sup> One practitioner has noted that the decision's instruction "that courts may consider social context is problematic . . . . Does that mean employees in blue-collar situations have less expectation of protection than someone in a white-collar, professional environment?"<sup>253</sup>

It is at least arguable that, in the wake of *Oncale*, fewer hostile work environment claims should be defeated at the summary judgment stage.<sup>254</sup> Justice Scalia indicated that a simple recitation of the words and acts at issue is inadequate to judge their impact, given the importance of context.<sup>255</sup> In addition, he wrote, "common sense" should be employed to distinguish harmless workplace conduct from discriminatory conduct.<sup>256</sup> This common sense standard could encourage judges to leave

249. *Id.* at 81. Justice Scalia's hypothetical is amusingly reminiscent of a comment in one district court's opinion as the judge explained his reasons for denying summary judgment to the employer on a secretary's sexual harassment claim: "Wherever else such conduct might be acceptable, a slap on the buttocks in the office setting has yet to replace the hand shake . . . ." *Campbell v. Bd. of Regents*, 770 F. Supp. 1479, 1486 (D. Kan. 1991).

250. *See, e.g.,* Yager, *supra* note 232, at 380 (reporting that the EEOC expected an increase in sexual harassment cases after *Oncale*).

251. *See* Jeffrey M. Schlossberg, *The Pendulum Swings Back in Sexual Harassment Cases*, N.Y.L.J., Mar. 17, 1998, at 1; *see also* Allan H. Weitzman, *Employer Defenses to Sexual Harassment Claims*, 6 DUKE J. GENDER L. & POL'Y 27, 57 (1999) (noting that "maneuvering room" had been left by *Oncale* and that "[a]ttorneys on both sides of the issue have claimed victory").

252. *See* Schlossberg, *supra* note 251, at 1.

253. Dominic Bencivenga, *Same-Sex Harassment: Ruling Puts Work Environment Under Scrutiny*, N.Y.L.J., Mar. 12, 1998, at 5 (quoting Pearl Zuchlewski, partner at Goodman & Zuchlewski, LLP).

254. *See id.* A trend toward more summary judgments in employment discrimination cases has been identified by one commentator. *See* Beiner, *supra* note 28, at 72-73 (asserting that judges are using this procedural device to clear crowded dockets when arguable issues of fact exist).

255. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79-82 (1998).

256. *Id.* at 82.



close cases to juries because "[t]he common sense of juries can span a whole range of behavior."<sup>257</sup>

#### IV. ANALYSIS

In *Meritor* and *Harris*, the Supreme Court removed arbitrary barriers that some lower courts had established for harassment claims—first, the requirement that the employee be economically harmed,<sup>258</sup> then, the requirement that the employee be psychologically harmed.<sup>259</sup> Since employees often quit their jobs before harassment exacts those costs, leaving those barriers in place would have had the effect of insulating some unlawful discrimination, when the Court has taken a stance of "strik[ing] at the entire spectrum of disparate treatment."<sup>260</sup>

Women and minorities who leave blue-collar jobs, usually for lower-paying positions, frequently report that they quit because they could not endure the hostility of the work environment.<sup>261</sup> Those who seek a legal remedy for the harassment must, in some courts, overcome the presumption that blue-collar environments come with a certain amount of natural coarseness

257. Bencivenga, *supra* note 253, at 5 (quoting Marc L. Silverman, partner at Brown & Wood). *But see id.* "[*Oncale*] will help employers get some cases dismissed that might not have been dismissed . . . . If . . . comments were made in the context of ordinary, welcomed socializing, there is no legitimate claim under Title VII." *Id.* (quoting Theodore O. Rogers Jr., partner at Sullivan & Cornwell).

258. *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67-68 (1986).

259. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (quoting *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986)).

260. *Id.*

261. *See* Gillian K. Hadfield, *Rational Women: A Test for Sex-Based Harassment*, 83 CAL. L. REV. 1151, 1172 (1996) (describing sexual harassment as an overt attempt to get female "intruders" out of blue-collar jobs and reporting that twenty percent of the tradeswomen in one study had quit a blue-collar job at some point because of the harassment); *see also* Elvia R. Arriola, "What's the Big Deal?" *Women in the New York Construction Industry and Sexual Harassment Law, 1970-1985*, 22 COLUM. HUM. RTS. L. REV. 21, 63 (1990) (relating that a male co-worker of a tradeswoman intentionally dropped a heavy fence she was carrying and broke her leg; when she came back to the work site in a cast, she found she had been accepted into the group, with only mild mistreatment thereafter—for example, men urinating in front of her and men grabbing her breasts); Jane L. Dolkart, *Hostile Work Environment Harassment: Equality, Objectivity, and the Shaping of Legal Standards*, 43 EMORY L.J. 151, 184-85 n.127 (1994) (citing one study in which 75% of female nontraditional workers had experienced sexual harassment and another in which 60% of tradeswomen reported sexual harassment, compared to only 6.4% of female clerical workers).

and hostility that is to be expected and that must be endured.<sup>262</sup> The policy reason for removing the barrier of the coarseness factor seems comparable to the reason for removing the barrier created by an economic or psychological harm factor; as long as the factor is maintained, a significant amount of unlawful behavior is sheltered, creating a "free-fire zone[]" for harassers.<sup>263</sup>

On the other hand, the Supreme Court has repeatedly stressed that all the circumstances must be assessed in a hostile work environment case.<sup>264</sup> In *Oncale*, the Court discussed the "totality of circumstances" requirement extensively in terms of context.<sup>265</sup> Looking at context, most blue-collar workplaces are materially different from the boardrooms, prep schools, and courthouses contrasted in these cases.<sup>266</sup> Rowdy, raucous, and crude behavior is common enough in blue-collar settings that arbitrators hearing industrial discipline cases consider making allowances for "shop talk" and "horseplay."<sup>267</sup>

But shop talk and horseplay do not inevitably involve discriminatory conduct, they are not necessarily widespread, and in any case, the prevalence of behavior does not automatically excuse it from scrutiny and correction.<sup>268</sup> For example, no one would argue that because workplace violence

262. See discussion *supra* Part II.

263. Reply Brief of Petitioner at 14, *Oncale v. Sundowner Servs., Inc.*, 523 U.S. 75 (1998) (No. 97-568).

264. See discussion *supra* Part III.

265. See *Oncale v. Sundowner Servs., Inc.*, 523 U.S. 75, 81-82 (1998). Lower courts have taken the Court's imprecise instructions on "totality" to mean that they should look at the "big picture" of all the harassing incidents in total (rather than judging them one by one), or that they should consider the context in which the discrimination took place, or both. See Beiner, *supra* note 28, at 81 (concluding that the Supreme Court wants factfinders to use both interpretations).

266. See, e.g., *Williams v. Gen. Motors Corp.*, 187 F.3d 553, 564 (6th Cir. 1999) (using courthouse hypothetical).

267. See, e.g., *Midland Brick & Tile Co. v. United Brick & Clay Workers Local 990*, 74 Lab. Arb. Rep. (BNA) 537, 538-41 (Mar. 3, 1980) (Roberts, Arb.) (considering, but rejecting, defenses of shop talk and horseplay for millroom laborer who was fired for starting a fight with a co-worker, calling him a "sonofabitch" and throwing mudballs).

268. See Estrich, *supra* note 45, at 845 (arguing that the pervasiveness of harassment creates an imperative that demands action, not an incentive to lighten up on enforcement); cf. Billie Wright Dziech & Robert W. Dziech, "Consensual" or Submissive Relationships: The Second Best-Kept Secret, 6 DUKE J. GENDER L. & POL'Y 83, 100 (1999) (arguing that the purpose of Title VII is to lift the negative influences of discrimination out of the workplace, not to import all the prejudices of the community into the workplace).

has become increasingly common in recent decades, employers and the courts should relax their standards to accommodate more “venting” by disgruntled employees in the workplace.<sup>269</sup> Instead, individual employees are expected to conform their behavior to a “zero tolerance” policy that operates to protect the interests of their co-workers and society as a whole.<sup>270</sup>

In *Oncale*, the plaintiff worked in the same tough job in the same roughshod setting that helped bar recovery for the hostile work environment plaintiff in *Vaughn v. Pool Offshore Co.* years before.<sup>271</sup> It is significant that the Supreme Court did not allude to the coarseness of Joseph Oncale’s work environment at all, particularly since Sundowner’s brief made the argument that the “male hazing behavior” in *Oncale* was similar to that experienced by Dennis Vaughn in his losing case.<sup>272</sup>

In *Smith v. Sheahan*,<sup>273</sup> the Seventh Circuit suggested that *Oncale* has rubbed out the last vestiges of *Rabidue*.<sup>274</sup> Remanding the sexual harassment case of a female jailer back to the district court, the court of appeals took the trial court to task for relying on the “much-criticized opinion” of *Rabidue*.<sup>275</sup> The district court had granted summary judgment, in part because the plaintiff had knowingly chosen to take a job in the abusive atmosphere of a male-dominated jailhouse.<sup>276</sup> The circuit court explained:

According to *Rabidue*, women or minorities who dare to work in settings that have traditionally been hostile to them assume the risk of some abuse and cannot complain to the courts unless the abuse is out of line with the subculture of that particular work setting . . . . Even if this aspect of *Rabidue* survived *Harris*, we think it did not outlive *Oncale*.

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269. Cf. Estrich, *supra* note 45, at 844-45 (drawing an analogy between sexual harassment and drug use and asserting that “the fact that a hazard is widespread should be a reason to ban it, not tolerate it”).

270. See *id.* at 845 (describing the typical employer reaction to employee drug use: “Vigilance. Zero tolerance. No leniency.”).

271. See discussion *supra* Part II.D.

272. Brief for Respondent at 6, *Oncale v. Sundowner Servs., Inc.*, 523 U.S. 75 (1998) (No. 97-568).

273. 189 F.3d 529 (7th Cir. 1999).

274. *Smith*, 189 F.3d at 534-35. For a discussion of *Rabidue*, see *supra* Part II.A.

275. *Smith*, 189 F.3d at 534.

276. *Id.*; see also *supra* note 8 and accompanying text (discussing the *Smith* district court case).

It is true that the severity of alleged harassment must be assessed in light of the social mores of American workers and workplace culture, . . . but nothing in *Oncale* even hints at the idea that the prevailing culture can excuse discriminatory actions. Employers who tolerate workplaces marred by exclusionary practices and bigoted attitudes cannot use their discriminatory pasts to shield them from the present-day mandate of Title VII. There is no assumption-of-risk defense to charges of workplace discrimination.<sup>277</sup>

The court counterbalanced these assertions by adding:

At the same time, we recognize that the culture of workplaces does differ from setting to setting. As the Supreme Court instructed in *Oncale*, juries—and judges—must bring their “common sense” and “an appropriate sensitivity to social context” . . . to bear when they make the threshold determination whether certain forms of behavior, in a given work setting, are discriminatory or not.<sup>278</sup>

Certainly, the mere fact that some blue-collar plaintiffs lose hostile work environment cases because the setting is considered is not reason enough to question the judgment of the courts.<sup>279</sup> Hostile work environment claims are highly fact-specific, and credibility issues can be determinative.<sup>280</sup> But applying the coarseness factor creates an institutional impediment to blue-collar workers who suffer discrimination.<sup>281</sup> If employees working in one setting must endure behavior and name-calling that single them out because of their race or sex, while employees in other settings are afforded protection from those indignities, the basic terms and conditions of employment are unacceptably out of kilter for the two groups.<sup>282</sup> The rulings

277. *Smith*, 189 F.3d at 534-35 (citations omitted).

278. *Id.* at 535.

279. *See Estrich*, *supra* note 45, at 838 (“What is troubling is the theory behind these opinions . . .”).

280. *See Jean Wegman Burns, Horizontal Jurisprudence and Sex Discrimination*, 49 HASTINGS L.J. 105, 127 n.72 (“[D]ecisions are highly fact-specific and vary with the eye of the beholding court.”).

281. *See Beiner*, *supra* note 28, at 126.

282. *See Williams v. Gen. Motors Corp.*, 187 F.3d 553, 564 (6th Cir. 1999) (arguing that tradeswomen do not deserve less protection from the law than women who work in more genteel settings).

in courts that vary their standards for severity and pervasiveness by the work setting create a patchwork of justice that makes it difficult for employers and employees to predict what they can expect from the law.<sup>283</sup>

If the coarseness factor is discarded by the courts that use it, it is possible that hostile work environment claims by blue-collar workers will increase, and statistics show a steady increase in harassment claims as it is.<sup>284</sup> And it follows that employers of blue-collar workers might overreact to the perception of increased liability, just as some employers and the military establishment have been reported to have overreacted to adjustments in the law or increased charge filings.<sup>285</sup> In *Oncale*, the Supreme Court implied impatience with overreaction, or at least with the perception that harassment law is overexpanding.<sup>286</sup> The Court was plain in its intent not to craft a "general civility code" from a statute about discrimination.<sup>287</sup>

But if the coarseness factor is removed, safeguards remain that protect employers from liability for the ordinary amount of rough give and take and unpleasantness that are present in any work setting.<sup>288</sup> Blue-collar plaintiffs will still have to prove that offensive behavior has been directed at them because of their race, sex, or other protected characteristic, and that it has risen to the level the law seeks to protect.<sup>289</sup> The safeguards outlined in the *Oncale* opinion are instructive.<sup>290</sup>

When Congress amended Title VII in 1972, the lawmakers made it clear the statute was designed to address occupational

283. See discussion *supra* Part II.

284. See, e.g., Beiner, *supra* note 28, at 72 n.6.

285. See, e.g., Chamallas, *supra* note 156, at 316 (characterizing military response to sex scandals as "gender panic" and relating that male recruits were briefed that looking at a female for more than three seconds constitutes sexual harassment); Vicki Schultz, *Sex is the Least of It: Let's Focus Harassment Law on Work, Not Sex*, THE NATION, May 25, 1998, at 11 (reporting one firm has declared male workers cannot look at women for more than five seconds and expressing concern that employers will become hesitant to hire women).

286. See *Oncale v. Sundowner Servs., Inc.*, 523 U.S. 75, 80-82 (1998).

287. *Id.*

288. See *id.* While teasing, horseplay, and flirtation are examples of innocuous behavior that, standing alone, are not sexual harassment, "conduct need not be motivated by sexual desire" to be actionable. *Id.* at 80-82. Harassment that is "motivated by general hostility to the presence of women in the workplace" is discrimination. *Id.* at 80.

289. See discussion *supra* Part III.

290. See *Oncale*, 523 U.S. at 80-82.

segregation.<sup>291</sup> While the door to "male-only" jobs has been opened to women, women's occupational choices are heavily influenced by an awareness that certain jobs dominated by men carry with them the burden of sexual harassment.<sup>292</sup> As a result, women avoid or leave high-paying "male jobs"<sup>293</sup> in favor of traditionally female jobs, exacerbating economic inequality and occupational segregation.<sup>294</sup>

Not long after the 1972 amendments to Title VII were enacted, the Supreme Court described the job market as "inhospitable to the woman seeking any but the lowest paid jobs."<sup>295</sup> Deliberate discrimination against women and the downstream effects of a "male-dominated culture" were the apparent causes.<sup>296</sup> The Court was optimistic that the situation would improve, but over twenty-five years later, women are still significantly under-

291. See H.R. REP. NO. 92-238, at 4-5 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2140 ("[W]omen are placed in the less challenging, the less responsible and the less remunerative positions on the basis of their sex alone. Such blatantly disparate treatment is particularly objectionable in view of the fact that Title VII has specifically prohibited sex discrimination since its enactment in 1964.").

292. See Marion Crain, *Between Feminism and Unionism: Working Class Women, Sex, Equality, and Labor Speech*, 82 GEO. L.J. 1903, 1913 (1994). While quid pro quo sexual harassment is more common in workplaces numerically dominated by women who report to male supervisors, sexually hostile work environments are more common in non-traditional settings in which females are numerically dominated by their male co-workers. See Crain, *supra* note 66, at 17-19. Crain asserts that hostile work environment harassers in blue-collar settings have two goals—reminding women of their place in the gender hierarchy and preserving male monopoly over their occupation. See *id.*; see also Schultz, *supra* note 4, at 1755 ("[A] drive to maintain the most highly rewarded forms of work as domains of masculine competence underlies many, if not most, forms of sex-based harassment on the job."); Joseph A. Rice, Jury Research Institute, *Defending Sexual Harassment Cases in the 90s*, at <http://www.jri-inc.com/sexharr.htm> (last visited Nov. 29, 1999) ("The rise in sexually hostile work environment claims appears to parallel the increased contact between female employees in work settings that were predominately male in nature."). See generally Ellen Neuborne, *Sex Harassment Suits Soar, Complaints High from Women in Blue-Collar Jobs*, USA TODAY, May 3, 1996, at 1A.

293. See, e.g., Hadfield, *supra* note 281, at 1173 n.95 (relating that women, in their first year as miners, more than doubled their pay from the previous year of waitressing and working in factories).

294. See Crain, *supra* note 66, at 29. One study indicated that seventy-five percent of women who are harassed quit their jobs. See Crain, *supra* note 292, at 1912 (citing James E. Gruber & Lars Bjorn, *Blue Collar Blues: The Sexual Harassment of Women Autoworkers*, in 9 WORK & OCCUPATIONS 271, 291-92 (1982)).

295. *Khan v. Shevin*, 416 U.S. 351, 353 (1974).

296. *Id.*

represented in the trade jobs that earn comfortable, high double-digit wages.<sup>297</sup>

Similar to sexual harassment and its influence on the wage-earning potential of women, racial harassment undermines the performance of minorities and discourages them from the highly-paid trades<sup>298</sup> that have historically been dominated by white males.<sup>299</sup> It is not uncommon to see evidence of "sexist racism or racist sexism"<sup>300</sup> in some blue-collar harassers, whose "behavior and attitudes . . . poison[] the work environment of classes protected under [Title VII]."<sup>301</sup>

297. See, e.g., *Enduring Images*, ATLANTA J. & CONST., Nov. 25, 1999, at L8 (noting that women make up forty-six percent of the work force and are making inroads in non-traditional occupations, but also indicating that only four percent of mechanics are women).

298. See Stanley Holmes, *Minorities, Women Paying in Grief for Jobs of the Docks*, SEATTLE TIMES, Mar. 23, 1997, at A1 (reporting that some semi-skilled waterfront workers earn the same money as doctors and lawyers; the average annual wage in 1996 for all dockworkers was \$65,000, for registered union members, \$70,000, and for the top jobs, well over \$100,000—all with fully paid medical benefits and as much as six weeks of paid vacation a year).

299. See *id.* (describing "personal fiefdoms" in which minorities and females, comprising just three to five percent of the dock work force, are dominated by the white male "ruling elite" of the longshoremen's union).

300. Arriola, *supra* note 261, at 42.

301. *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 626 (6th Cir. 1986) (Keith, J., dissenting in part, concurring in part); see Arriola, *supra* note 261, at 59 (reporting assertion of foreman to a black female ironworker that he was "anti-woman and anti-black" and the only reason he tolerated her was because of "the law"); see also *Wilson v. Chrysler Corp.*, 172 F.3d 500, 507 (7th Cir. 1999) (relating that co-workers told a black female assembly line worker that the white guys spoke to her only because they "wanted [her] tu-tu" and accused her of "sucking a white boy's dick on the roof"); *Carr v. Allison Gas Turbine Div.*, 32 F.3d 1007, 1010 (7th Cir. 1994) (describing conduct of white male tinsmiths who not only harassed the female plaintiff, but made comments like "I'll never retire—that would make an opening for a nigger or a woman," and accused a black male co-worker who was only intermittently hostile toward the plaintiff of "being after that white pussy"); *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1461, 1464 (9th Cir. 1994) (relating that the supervisor of a casino's first female floor person called her a "dumb fucking broad" and "cunt," and called Asians "UFOs" (for "ugly fucking Orientals"); *Zabkiewicz v. W. Bend Co.*, 589 F. Supp. 780, 783 (E.D. Wis. 1984) (describing graffiti in a warehouse showing a white female forklift operator giving birth to a black child and having sexual relations with an animal). Ageism gets in the bias mix too. See, e.g., *Andrews v. Philadelphia*, 895 F.2d 1469, 1475 (3d Cir. 1990) (describing the reaction of a female police officer's boss when she told him her male counterparts were sabotaging her work files: "You know, you're no spring chicken. You have to expect this working with the guys."); *Baty v. Willamette Indus.*, No. 96-2181-JWL, 1997 U.S. Dist. LEXIS 8031, at \*6 (D. Kan. May 1, 1997) (reporting a statement made by the plant manager when a female temporary complained about sexually explicit remarks of supervisors in the plant: "[Y]ou have to expect stuff like this . . . some women your age look a hell of a lot

Such behavior should not go unchecked in the American workplace.<sup>302</sup> It is illogical to give the coarseness of the working environment any significant weight; to do so means that the more abusive the environment is and the more rampant pre-existing sexism and racism are, the more difficult it is for an employee to make out a hostile work environment claim, and the more difficult it is to prevent the behavior in the future.<sup>303</sup> Courts that use the coarseness factor to deny relief to Title VII plaintiffs in offensive hostile work environments preserve the status quo.<sup>304</sup> One commentator on sexually hostile workplace law noted:

How many judges, as employers, would tolerate such conduct by others in their own workplaces? The answer . . . is very few. Yet, these same judges, as judges, seem willing to tolerate such behavior . . . based apparently on the perception that in the "rough and tumble" world of many workplaces, a certain degree of sexually abusive behavior is inevitable. If there are workplaces where sexually crude behavior persists, it is the judges, armed with Title VII, who have the power to make a change.<sup>305</sup>

Title VII is a remedial statute that was enacted to "eradicate . . . invidious employment practices."<sup>306</sup> Under traditional rules of statutory construction, remedial statutes are liberally construed to help achieve the intended remedy.<sup>307</sup> For Title VII's objectives to be fully realized, working class women and minorities must be afforded the additional measure of dignity and protection they will gain when judges stop excusing some

worse than you do.").

302. See *supra* note 301 and accompanying text.

303. See, e.g., *Jackson v. Quanex Corp.*, 191 F.3d 553, 662 (6th Cir. 1999) (indicating that the district court granted judgment as a matter of law to the defendants because racial harassment had become so widespread, it was standard operating procedure for the facility).

304. See *id.*

305. Gregory, *supra* note 20, at 777 (footnote omitted). Though he did not write this article in an official capacity, Gregory is the Senior Appellate Attorney in the General Counsel's office of the EEOC. See *id.* at 741.

306. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 381 (1977) (Marshall, J., concurring in part, dissenting in part).

307. See *id.* (Marshall, J., concurring in part, dissenting in part); see also *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 102 (1990) (Stevens, J., concurring in part, dissenting in part) ("Title VII, a remedial statute, should be construed in favor of those whom the legislation was designed to protect.").



discriminatory conduct and comments because they occurred in a blue-collar setting.<sup>308</sup> Judges shape the law, and the law shapes behavior.<sup>309</sup> Even-handed judicial policies that encourage the prevention of harassing behavior in all types of workplaces support the aims of Title VII, and they honor an American workforce that is diverse in race, gender, religion, and national origin, but also diverse in the ambitions and opportunities its workers have for making a living.<sup>310</sup>

### CONCLUSION

Some courts significantly discount the significance of harassment reported by plaintiffs in blue-collar work environments by factoring in the coarseness thought to be innate in those job settings.<sup>311</sup> The idea that naturally "rough hewn and vulgar" environments should be allowed to stay that way got its greatest exposure in *Rabidue v. Osceola Refining Co.*, a sexual harassment case in 1986.<sup>312</sup> Though *Rabidue* has been formally followed less and less, its logic lives on for blue-collar minorities and women.<sup>313</sup>

Title VII was designed to combat the "entire spectrum of disparate treatment."<sup>314</sup> When courts use a coarseness factor, they limit the ability of women and minorities to enjoy equal status in working class settings where they were not traditionally employed, and where they are not always welcomed.<sup>315</sup> The Supreme Court has stressed that the proper inquiry is whether an individual's working conditions have been

308. See discussion *supra* Parts III-IV.

309. See, e.g., STEFAN KRIEGER, *ESSENTIAL LAWYER'S SKILLS* 200 (1999) (quoting KARL LLEWELLYN, *THE BRAMBLE BUSH* 180 (1930) ("There is no precedent that the judge may not at his need either file down to razor thinness or expand into a bludgeon.")).

310. See 29 C.F.R. § 1604(f) (1999) ("Prevention is the best tool for the elimination of . . . harassment.").

311. See discussion *supra* Part II.

312. See discussion *supra* Part II.A.

313. See, e.g., *Filipovic v. K & R Express Sys.*, 176 F.3d 390, 398-99 (7th Cir. 1999) (finding no basis for plaintiff's national origin claim because ethnic slurs are a normal part of the environment in a dockworker's job); *Reynolds v. Atl. City Conv. Ctr.*, 53 Fair Empl. Prac. Cas. (BNA) 1852, 1866 (D.N.J. 1990) (finding female electrician had not been unlawfully harassed because she worked in an environment in which obscenity prevailed).

314. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986).

315. See *supra* notes 292-97 and accompanying text.

discriminatorily altered, not whether the pre-existing working environment has been altered.<sup>316</sup> While the Court's instruction to look at all the circumstances could certainly inspire the examination of work settings, courts rarely factor the plaintiff's work environment into their decision-making process except in the blue-collar cases.<sup>317</sup>

Title VII's remedial purpose is best served when courts analyze the hostile working environments of blue-collar plaintiffs using the general principles that have been established for all workers.<sup>318</sup>

*Rebecca Brannan*<sup>319</sup>

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316. See discussion *supra* Part III.

317. See discussion *supra* Part II.D.

318. See discussion *supra* Part IV.

319. I thank Professor Kelly Timmons for helping me select and shape this topic, and I thank John Hagen for nudging me into law school when I was wavering.

